COMPETENCY OF ONE SPOUSE TO TESTIFY AGAINST THE OTHER. — The rule that a wife may not testify against a husband or a husband against a wife in any action to which the other is a party or in the outcome of which he is interested is too well settled to be disputed.[1] How far, however, in actions between third parties, one spouse may testify to matters that tend to criminate the other is still a vexed question. Yet the reason for the exclusion of the testimony is the same in both cases — a reason of supposed public policy, the danger, namely, of creating marital dissension. Admitting that the reason is sound, the question arises as to the scope of its application. Interest, the reason for that other rule which forbids one spouse to testify for the other, obviously goes to the competency of the evidence. But does the necessity for preserving marital peace point beyond a rule of privilege? It seems plain enough that no public policy imposes any such quixotic obligation on the courts as that of restoring a domestic harmony which the willingness of the witness to testify reveals as probably irretrievably shattered. Nevertheless, from Lord Coke's time down, the courts have treated testimony against a spouse as inadmissible;[2] and, where exceptions are sanctioned, it seems generally to be taken for granted (often *dicta* expressly state it[3]) that the witness could not have been compelled.

But does public policy require even that an unwilling witness should always be privileged? It certainly seems open to serious question whether, in the majority of cases, even compelled testimony would produce the dire results contemplated. The courts, nevertheless, almost universally content themselves with purely perfunctory reasoning; and, however grave the issue, rarely stop to consider the other side of the question, — the possible consequences of a suppression of the truth. The mercy of the rule has been pushed to merciless extremes. Thus, in a South Carolina case, a conviction for murder was ruthlessly affirmed, although, on the trial, the wife of one who had been jointly indicted with the defendant but was not to be tried, was not permitted to testify that her husband alone was the murderer.[4] Perhaps the best solution would be to leave the question to the discretion of the trial court.

Most frequently, perhaps, the question arises in criminal trials for adultery. It is, of course, well settled that where both offenders are tried together, the wife or husband of either is incompetent.[1] Where, however, the paramour alone is on trial, there is a sharp conflict.[5] The cases have been collected and discussed in a recent article. *Wife Testifying against Husband's Paramour in Adultery Cases,* by Edward W. Faith, 60 Cent. L. J. 164. In these cases, as elsewhere, the courts discuss the question as one of competency alone, though it must be evident that whatever force the con-

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[1] See 1 Greenleaf, Ev., 16th ed., § 334 *et seq.*

[2] See 3 Wigmore, Ev. § 2227.

[3] See King *v.* All Saints, 6 M. & S. § 194; Woods *v.* State, 76 Ala. 35; in Brock *v.* State, 44 Tex. Cr. App. 335, and in Barber *v.* People, 203 Ill. 543, the court went so far as to hold that the privilege could not be waived even by the husband against whom the testimony was offered.

[4] State *v.* Bradley, 9 Rich. (S. C.) 168. It does not even appear that the witness was unwilling. In Ware *v.* State, 35 N. J. Law 553, the conviction was reversed for a similar ruling at the trial.

[5] Excluding the testimony: State *v.* Welch, 26 Me. 30; State *v.* Gardner, 1 Root (Conn.) 485; Com. *v.* Sparks, 89 Mass. 534; State *v.* Wilson and Wagner, 31 N. J. Law 77. Admitting the testimony: State *v.* Marvin, 35 N. H. 22; State *v.* Bridgman, 49 Vt. 202 (*semble*, that the witness would not have been allowed to testify to the act itself); State *v.* West, 118 Wis. 469; Campbell *v.* State, 133 Ala. 158.

ventional argument of public policy has in other situations, in the case of a witness willing to testify to the infidelity of a spouse it becomes almost grotesque.[6] But if the witness is unwilling, there would seem to be in this instance a valid reason for excusing him. No rights of third parties are involved, and the right of the state to secure a conviction should be subordinated to the desire of the witness, for his own sake or the sake of his children, to condone the offense. Though the point appears never to have arisen, it is highly improbable that the testimony would ever be compelled.[7]

CONVEYANCE OF LAND UPON AN ORAL TRUST. — When land is conveyed upon an oral trust, the grantee, who refuses to perform his promise under the protection of the Statute of Frauds, is by the English courts made a constructive trustee for the grantor.[1] In the United States, however, he may repudiate his unenforceable obligation and keep the land upon payment to the grantor of its fair market value.[2] But if the conveyance was induced by fraud a constructive trust arises. And on account of the harshness of the general American doctrine, a ready disposition to find fraud from the circumstances of the case or the relation of the parties is manifested. Thus, even though the conveyance was not actively induced, a present intention not to execute the trust constitutes sufficient fraud to vitiate the transaction, and the subsequent repudiation is evidence of a fraudulent purpose at the outset.[3] Similarly, where a confidential relation exists between the parties, the transaction is presumed to be fraudulent.[4] Just what constitutes confidential relations is somewhat in dispute. There is, for example, a square conflict whether a conveyance to a wife upon an oral trust is ground for equitable intervention.[5] The tendency of the courts, however, is illustrated by a recent Nebraska decision. The plaintiff, who owned a half-interest in land, conveyed his share to his co-owner upon an oral agreement by the latter to reconvey. He was allowed to recover his interest on account of the fiduciary relation between the parties. *Koefoed* v. *Thompson*, 102 N. W. Rep. 268.

The basis of the American rule seems to be the conception that to raise a constructive trust, as the English courts do, would be to go directly in the teeth of the Statute of Frauds. Of course, where the transaction is tainted with actual fraud, the statute does not apply and restitution is the ordinary equitable remedy. To imply fraud, however, from the relation of the parties is simply to use a fiction to avoid the application of an unpalatable doctrine. The injustice of allowing the grantee unduly to enrich himself, is recognized by charging him with the value of the land. This is a direct admission that he has received something which he is not entitled to keep, and it is, therefore, difficult to see why restitution is not the proper remedy.[6]

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[6] See State *v.* Briggs, 9 R. I. 361.

[7] The question could not, of course, arise in states where the indictment can be brought only on the complaint of the husband or wife.

[1] Davies *v.* Ottley, 35 Beav. 208; *In re* Duke of Marlborough, [1894] 2 Ch. 133.

[2] Burt *v.* Wilson, 28 Cal. 632.

[3] *Cf.* Brown *v.* Doane, 86 Ga. 32.

[4] Wood *v.* Rabe, 96 N. Y. 414.

[5] See Brison *v.* Brison, 75 Cal. 525. *Contra*, Brock *v.* Brock, 90 Ala. 86.

[6] See Dickerson *v.* Mayo, 60 Miss. 388.